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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. 76-1614

HARPER SIBLEY, JR., *Petitioner*,

v.

TANDY CORPORATION, ET AL, *Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Respondent Tandy's Brief In Opposition

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PREFACE

The Record on Appeal before the United States Court of Appeals for the Fifth Circuit consisted of an Appendix of five volumes, Volume I containing an Index to Volumes I-IV and Volume V containing the Exhibits and an Index to same. References in this Brief to "A" and a page number are to such Appendix. There is also an Appendix to the Petition. For distinction, references to that Appendix will be designated "A. to Petition" followed by a page number.

Emphasis supplied throughout this Brief.

IN THE

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Petitioner's effort to secure further review by this Court is bottomed upon the false premise that the opinion below of the Court of Appeals has established a new standard that abrogates the rule of *Wilko v. Swan*, 346 US 427 (1953). When the Fifth Circuit's opinion is correctly interpreted as simply ruling that the trial court erred in failing to stay trial of the non-arbitrable but *dependent*[1] federal securities fraud issue pending arbitration of contractual issues, it readily appears that the Fifth Circuit has properly

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[1] Dependent because Petitioner's Complaint (A. 14, ¶19) made it so by alleging Count IV, the 10-b fraud claim, only in the alternative if the contract sued upon be "found unambiguous" and if he lost on his contractual, equitable claims of specific performance and reformation.

preserved the federal policy favoring arbitration[2] without in any manner repudiating *Wilko*.

OPINIONS BELOW

The initial opinion of the Court of Appeals is reported at 543 F.2d 540 (5th Cir. 1976). The subsequent opinion denying Petitioner's Motion for Rehearing is not reported. Both opinions of the Court of Appeals, and that of the District Court denying Respondents' Motion to Stay, are all included in the Appendix to the Petition for Writ of Certiorari and hence are not repeated herein.

JURISDICTION

The jurisdictional requisites for filing the Petition for Certiorari are adequately set forth in the Petition. Respondents deny that the Petition presents any of the grounds required by Rule 19-1(b) of this Court for the granting of a Writ of Certiorari.

QUESTION PRESENTED

Where a plaintiff alleges non-arbitrable federal securities claims only in the alternative and conditioned upon his failing to recover on his arbitrable contractual claims, should this Court review by certiorari determination by the Court of Appeals that the Trial Court erred in failing to grant Respondents' request that the non-arbitrable issues be stayed pending arbi-

[2]Especially favored where, as under the unique circumstances present here, arbitration of the contractual issues may dispose of all issues because, as conceded by Petitioner, if he be successful in arbitration, his 10b-5 claims must be rejected.

tration of the arbitrable contractual claims in accordance with the arbitration clause of the contract sued upon?

STATUTES INVOLVED

The pertinent provisions of the Exchange Act, 15 USC §78cc(a), and of the United States Arbitration Act, 9 USC §3, are set forth in the Petition (p. 4).

STATEMENT OF THE CASE

Petitioner Sibley's ("Sibley") statement of the case is argumentative, inaccurate and incomplete, compelling this counterstatement to correct his inaccuracy and omission (Supreme Court Rule 40[3]):

Background of the Contract in Suit

Because this is a suit on contract, we first examine the factual background of its negotiation and consummation.

P. J. Parker, Inc. ("Parker") was a privately held corporation organized in January 1970 to acquire Hickok Manufacturing Co., Inc., a manufacturer and seller of men's belts, wallets, jewelry, etc. As Parker reported on July 1, 1971, to the Justice Department[3],

[3]This report (Pl. Ex. 11, A. 1816, admitted A. 321) was presented to the Antitrust Division of the Justice Department to explain why it should immediately grant Parker, under the "failing corporation" doctrine, antitrust clearance to merge with Tandy, thereby enabling Parker's attorneys to submit an opinion that no material proceeding or governmental investigation was pending or threatened against the Parker company or its wholly owned subsidiary Hickok (which opinion was a condition precedent to consummation of the merger [Article VII, A. 1784-1786]).

it:

> "was formed by a group of businessmen principally from Rochester to prevent Hickok's bankruptcy" (A. 1817).

Hickok was acquired by Parker on February 20, 1970, but Hickok's financial condition continued to deteriorate. Additional financing was sought without success. The bankers were fidgeting. In the spring of 1971 Parker negotiated with Tandy concerning a statutory merger and a tentative agreement was reached. On April 21, 1971, Mr. P. J. Parker, its president, wrote each member of his board of directors in support of the proposal (Pl. Ex. 9, A. 1765, admitted A. 259-60). He described the precarious financial plight of Parker and predicted its imminent insolvency:

> "Although in time I think we can become competitive, we have to operate with poor profits in the meantime and poor profits may not generate enough money to pay our debts as they become due." (*Id.*, A. 1768).

A formal, written "Merger Agreement" (Pl. Ex. 10, A. 1769, admitted A. 285) (the contract here sued upon) was executed June 4, 1971. The contract contemplated a closing on July 1, 1971 (¶4.1, A. 1777).

In further support of the merger, that would result in a refinancing of the Parker-Hickok operations, Mr. Parker reported to his board of directors on June 10, 1971:

> ". . . without the needed financing, the company would cease to be a viable operation by September of 1971." (Def. Ex. 4, A. 2047 at 2054, admitted A. 408-9).

The Justice Department had questioned the merger from an antitrust standpoint. To secure requisite clearance, Mr. Parker went to Washington and met with the Antitrust Division of the Justice Department, presenting a set of documents[4] he had prepared for the meeting. This report in unmistakable language disclosed Parker's financial desperation:

> "The financial tables show that without a major infusion of cash on July 1, Parker will have to declare bankruptcy on July 2." (A. 1817).

One of those tables ("Cash Forecast", p. 3 of such Pl. Ex. 11, supra, p. 3 n. 3) showed that beginning at June 28, 1971, Hickok did not even have funds available to meet its payroll.

The Justice Department acted promptly. It gave clearance on July 1, 1971 and Closing was had on the same date (Parker's testimony, A. 322, lines 4-12).

Parker's Warranted Net Worth

Section 5.2(a) of the Merger Agreement defined the "Purchase Price" for the interest being acquired by Tandy in the merger as being $3,830,970 (payable in Tandy stock). Because the Parker-Hickok financial plight demanded immediate action, there had been no time to verify that the warranted values Tandy was to receive in fact existed. Consequently, the "Purchase Price" payable was subject to deduction if a future balance sheet did not reflect the guaranteed net worth minimum. Section 3.1 warranted that Parker's con-

[4] The report referred to supra, fn. 3, p. 3.

solidated net worth as of June 30, 1971:

> "as shown in a consolidated balance sheet to be prepared in accordance with Article VIII of this Plan, shall be not less than $1,957,000" (A. 1774)

Section 8.3 of such agreement provided that, in order to ascertain such consolidated net worth as of such date and the accuracy of the Parker representations and warranties with respect thereto, Parker's consolidated balance sheet as of June 30, 1971 and the related P&L statement for the six-month period then ended (collectively the "1971 Audit") were to be examined by the national accounting firm of Price Waterhouse & Co. (A. 1789).

The Escrow Agreement

Attached to the Merger Agreement as its Exhibit "B" was the "Escrow Agreement" to be executed at Closing. It was so executed and delivered at Closing on July 1, 1971, as an integral part of the contractual arrangement. Its purpose, as specified in ¶8.2 of the Merger Agreement, was to "secure the representations and warranties of Parker" made in the basic agreement (A. 1789).

Paragraph 5.4 of the Merger Agreement (A. 1780) provided that 1/3rd of the amount of Tandy shares payable as the "Purchase Price" was to be placed in escrow with and held by the Escrow Agent:

> "as security for the performance by Parker of the covenants to be performed by it under the Plan and for the accuracy of the representations and warranties made by Parker in the Plan" (A. 1984),

and:

> "to secure and indemnify Tandy in the manner hereinafter stated against and in respect of any *Damages* suffered by Tandy" (¶2, A. 1987).

"Damages" was defined by the Escrow Agreement to specifically include:

> "All losses . . . sustained, directly or indirectly, by Tandy . . . to the extent that they . . . result from a breach of any of the warranties made by Parker in the Plan . . . Damages shall include:
>
> "(a) The amount of any liability . . . of Parker or Hickok . . . not included among or reflected in . . . the 1971 Audit. (A. 1985).
>
> * * *
>
> "(e) One Hundred Ninety-Six percent (196% of the amount by which the consolidated net worth of Parker, as shown in the 1971 Audit, shall be less than $1,957,000."[5] (A. 1986).

Under the terms of the Escrow Agreement, the amount of the Purchase Price was thus subject to reduction in an amount equivalent to 196% of the dollar amount, if any, by which the consolidated net worth of Parker, as shown in such 1971 Audit, was less than the warranted amount of $1,957,000.

Arbitration Provision

In both the Merger and Escrow Agreements express

[5]The reason why the parties agreed upon this 1.96 factor in case of a Parker net worth deficiency was that Tandy was paying $1.96 of Purchase Price for every $1.00 of guaranteed net worth. The total Purchase Price of $3,830,970 divided by the $1,957,000 guaranteed net worth equals $1.96 (A. 1545, lines 6-13).

provision was repeatedly made for arbitration of any dispute or controversy arising thereunder. Any such arbitration was to be conducted:

> "in Fort Worth, Texas in accordance with the laws of the State of Texas and the Rules of the American Arbitration Association. . . ." (¶11.1, A. 1792).

The Dispute Over Parker's Warranted Net Worth

Promptly after Closing, the inventory of Parker-Hickok contemplated by the Merger Agreement was commenced. It quickly became apparent that recent returns by dissatisfied buyers of Hickok merchandise were reaching all-time highs. Subsequently, after this litigation was commenced and during the course of discovery, Tandy ascertained that Parker had made a deliberate attempt to conceal these "abnormally high number of returns"[6] which were "coming in at the highest rate in . . . (Hickok's) history."[7] The concealment was effectuated on June 4, 1971, the very day the Merger Agreement was signed, by instruction from Parker to all of its managers to attempt to *delay* returns of merchandise by customers until after July 1 — the contractual date for Closing of the merger:

> "No additional returns will be accepted in the house *until July 1*. . . .
>
> "If for some reason a salesman must remove goods from a store prior to July 1, do all in your

[6] Mr. Parker's letter to one of his bankers of May 4, 1971 (Def. Ex. 2, A. 2037; admitted A. 404).

[7] Telegram from Parker's Merchandising Manager to all Sales Managers of March 22, 1971 (Def. Ex. 6, A. 2060 at 2061; admitted A. 437-8).

> power to have it shipped to reach us *after* July 1. If it comes in earlier, it will not be processed anyway." (Def. Ex. 7, A. 2063; admitted A. 438)

Under date of October 22, 1971, Price Waterhouse & Co. ("PW") issued its first draft of the 1971 Audit (Pl. Ex. 29, A. 1893; admitted A. 514). The Petition (pp. 17-18, 21) twice inaccurately and inexcusably represents that this draft "showed Petitioner to be entitled to all the escrowed Tandy stock." This is just not so. That draft expressly pointed out that there were "unresolved matters which affect the accompanying financial statements" (A. 1894) and that accordingly PW was of the opinion that those financial statements "do *not* present fairly the financial position of P. J. Parker, Inc. and subsidiaries at June 30, 1971, or the results of operations for the six months then ended." (A. 1895). PW's opinion cautioned that any reliance on the attached financials for purposes of the Merger Agreement should be subject "to any adjustments that may result" from resolution of the differences of opinion existing between the parties to such agreement (A. 1895).

That there were at that time such unresolved matters affecting the net worth of Parker indisputably appears from Mr. P. J. Parker's letter of September 25, 1971 to PW (Pl. Ex. 14, A. 1833; admitted A. 348) challenging the PW draft. Mr. Parker attached to his letter an exhibit showing the net worth according to the PW draft as compared to the larger net worth reflected in his own "P. J. Parker Draft" (A. 1840).

Tandy's Impoundment Notice

The Escrow Agreement afforded Tandy the right, if it believed it had a claim for or had suffered Damages, to give notice impounding sufficient number of the escrowed shares as would be sufficient to indemnify Tandy for the amount of Damages specified in such notice (¶4, A. 1988). A time limit was imposed however because the first half of the escrowed Tandy shares was to be released on December 31, 1971 and delivered by the Escrow Agent to the Sibley group unless impoundment be theretofore effected (¶8, A. 1990). Under a similar provision, the other half of the escrowed shares was to be delivered on June 30, 1972, absent impoundment. Thus, if Tandy wanted to assert any claim secured by the escrowed shares, it was required to give notice prior to the two deadlines imposed.

With the accounting disputes unresolved and the first deadline rapidly approaching, Tandy did what the parties had agreed in §4 of the Escrow Agreement (A. 1988) it should do: it gave an impoundment notice by letter dated December 13, 1971 (Pl. Ex. 38, A. 1982; admitted A. 729).

Such notice was in strict compliance — the exact opposite of a breach — with the express terms of the Escrow Agreement. Yet the Trial Court not only permitted Parker to repudiate the detailed provisions of both agreements, calling for arbitration of disputes arising under such contracts, but even worse, described Tandy's action in following the procedure specified by the parties as a "malicious and willful *breach* of con-

tract" (A. 183). Instead of availing of the right granted by the Merger Agreement [¶8.3(d), A. 1790] to have an independent third party accountant resolve the disputed accounting matters, or to seek such resolution by the contractually agreed arbitration, Sibley resorted to litigation.

Sibley's Trial Court Position

Petitioner's Complaint advanced six counts which we next analyze because the position taken in them had a crucial bearing upon proper determination of Tandy's Motion to Stay:

> *Count I* — sought specific performance of the contract sued upon by asserting a right to receive the escrowed Tandy stock "in accordance with the Agreements" (A. 11-12, ¶13).
>
> *Count II* — likewise sought specific performance, concluding plaintiff was entitled "to all of the escrowed stock" (A. 12, ¶16).
>
> *Count III* — sought reformation of the contract (A. 12, ¶17).
>
> *Count IV* — was only alleged in the alternative and if the contract in suit be "found unambiguous" and if Respondent Tandy's reliance upon the 1971 Audit be sustained (A. 14-15).
>
> *Count V* — alleged that to the extent plaintiff breached its net worth warranty or failed to disclose all its material liabilities, it had a similar cause of action against the Hickok estate from whom it had acquired the Hickok corporation and

that Tandy succeeded to such cause of action, thereby offsetting any deficiency (A. 15, ¶24).

Count VI — again alleged common law fraud based on claimed misrepresentation as to future value of Tandy stock (A. 15, ¶25).

Counts I, II, III and V asserted contractual claims in *reliance* on the contract while Counts IV and VI alleged fraud in *disaffirmation* of the contract.

In response to service of the Complaint, Tandy promptly moved, under the Federal Arbitration Act (9 USC §2), for stay of the proceedings with respect to Counts I, II, III, V and VI "until arbitration of the issues arising under said counts has been had in accordance with the agreement between plaintiff and Tandy to arbitrate all such disputes" (A. 63). Subsequently, and some fourteen months prior to trial, Tandy sought stay of the statutory and common law fraud claims pending arbitration:

> "Tandy asks that the court stay both Counts IV (securities law count) and Count VI (common law fraud count) until the remaining counts can be arbitrated." (A. 83).

The Trial Court overruled the Motion to Stay on the erroneous ground that arbitration was "inappropriate in this cause"[8] because the contractual claims were "so intertwined with the rule 10b-5 allegations in Count IV. . . ."[9]

[8]A. to Petition, p. 2.
[9]A. to Petition, p. 3.

Thereafter, jury trial was had and judgment rendered on the merits in favor of Petitioner, from which *both* Sibley and Tandy appealed. The Fifth Circuit ruled that the Trial Court:

> "erred when it denied Tandy's motion to submit the contract claims to arbitration and refused to stay the securities fraud claims pending the outcome of that arbitration".[10]

The Fifth Circuit's opinion expressly noted that it was not passing upon the merits and instead was only considering:

> "the problem of what a court should do where arbitrable claims are joined with claims not subject to arbitration."[11]

Sibley's Petition advances as if controlling here the decision in *Stockwell v. Reynolds & Co.*, 252 F. Supp. 215 (S.D.N.Y. 1965). Before the Trial Court he conceded (A. 77) that *Stockwell* was "factually distinguishable from the instant case" because

(a) the 10b-5 fraud counts in *Stockwell* were "all-inclusive" while

(b) in Sibley's case, he would be entitled to judgment if the contract he sued upon was unambiguous and required the Parker net worth to be calculated as he desired even though this would be a bar to his fraud claims (because he could not recover under mutually exclusive and contradictory theories).

[10]A. to Petition, p. 8.
[11]Ibid.

Sibley said that "because of this distinction" he was advancing *Stockwell* "only alternatively." His alternative position was that if arbitration were to be ordered, it should, as in *Stockwell*, be stayed pending "judicial disposition of the 10b-5 count." (A. 77).

Because the Court of Appeals ruled the sequence of events should be reversed, and that *arbitration* should come first, Sibley seeks certiorari (Petition, p. 6) on the ground that the Fifth Circuit thereby adopted a new and "unworkable and potentially wasteful standard." Such a claim flies in the teeth of Sibley's trial court position (A. 74) that if the contractual issues be resolved in Sibley's favor "there was no scheme" (i.e., no fraud) and that only if the contractual dispute be first resolved in Tandy's favor must "plaintiff's allegation of fraud . . . be resolved." (A. 74). Sibley thus recognized his contractual claims should be tried first, but he wanted them tried by the court instead of being resolved by the arbitration to which he had contractually agreed.

In view of Sibley's trial court position, it is inaccurate for the Petition (p. 4) to state here that:

> "This dispute has always turned upon what petitioner contends was a variance between respondent's pre-acquisition representations and its post-acquisition conduct"

because that dispute was only raised by alternative Count IV, made dependent upon Sibley's losing his claims for reformation and specific performance.

Based on allegations of the Complaint, as well as

the Amended Complaint and trial record, the Fifth Circuit's opinion characterized this litigation as being "essentially a dispute over corporate valuations centered around complex issues of accounting and valuation" (A. to Petition, p. 10). The arbitration process, based on the expertise of an arbitrator, is especially adapted for resolution of such complex commercial issues as contrasted with consideration of them by a jury of laymen.

ARGUMENT

The Decision Below Correctly Preserved the Federal Policy Favoring Arbitration, As to the Arbitrable Contractual Issues, While at the Same Time Preserving Petitioner's Right to Judicial Resolution thereafter of the Non-Arbitrable Fraud Claims Based on the Federal Securities Act, if not Mooted by that Arbitration.

While the contract in suit provided for arbitration of all disputes arising under it, Tandy expressly recognized before the Trial Court it was not entitled to arbitration of the 10b-5 fraud claims raised by Count IV of the Petition (Tandy's Brief in Support of Its Motion to Stay, A. 68, 70-1, ¶¶3-4). Since that Count IV was alleged only in the alternative (A. 14, ¶19), and because Sibley's position before the Trial Court was that only if he lost on his contractual claims must his "allegation of fraud . . . be resolved" (A. 74), Tandy requested the court to stay trial of the fraud claims of Counts IV and VI pending arbitration of the contractual issues (A. 83).

As alleged in the Complaint[12] Sibley sought mutually exclusive recoveries: The first an affirmance of the contract by seeking reformation and specific performance of it as to entitle his group to the escrowed shares of Tandy stock; and the second, disaffirmance of that contract by alternatively alleging fraud in the inducement.

The primary thrust of the Petition (p. 6) is that this Court should grant certiorari in order to correct what is said to be establishment of a new and "unworkable and potentially wasteful standard for determining arbitrability of disputes involving both arbitrable and non-arbitrable issues." This is mere pretense. No such standard was established.

The Petition's chief reliance is upon a 1970 decision by a New York United States District Court — *Shapiro v. Jaslow*, 320 F.Supp. 598. Shapiro sued both defendant Jaslow and defendant Newburger, Loeb & Co. ("Newburger"), alleging violation of the federal securities laws. Jaslow filed cross-claims against Newburger.

Newburger moved to stay Shapiro's action on the ground the Shapiro complaint alleged only wrongs at common law and hence should be subject to arbitration. Simultaneously Newburger caused a demand for arbitration to be served on Shapiro as well as upon Jaslow with respect to the Jaslow cross-claims against

[12]The Motion to Stay was overruled September 10, 1973 (A. 2, A. to Petition, p. 3). A year later Sibley filed his Amended Complaint (A. 3). In its determination the Fifth Circuit properly considered the position of Petitioner as set forth in its Original Complaint (A. to Petition, p. 12, fn. 5) because that was the only pleading of Petitioner before the Trial Court when it ruled on the Motion to Stay. For this the Petition (p. 22, fn. 12) faults the Fifth Circuit.

Newburger. Judge Bryan denied Newburger's motion to compel arbitration as against Shapiro under the doctrine of *Wilko v. Swan*, 346 U.S. 427 (1953) because the Shapiro claims were based on the federal securities laws. The subject opinion by Judge Mansfield does not involve such earlier action by Judge Bryan other than to mention it in passing.

Judge Mansfield's opinion does consider Newburger's contentions concerning the Jaslow cross-claims. Those Jaslow cross-claims against Newburger jointly alleged violation of the federal securities act *and* the common law. Newburger argued that while the Jaslow claims under the securities laws could not be arbitrated, the Jaslow "common law cross-claims should be subject to arbitration." (320 F.Supp. 599, bottom 2nd. col.).

As stated above, Newburger had instituted arbitration proceedings against both plaintiff Shapiro and cross-plaintiff Jaslow, and Judge Bryan had earlier disposed of Newburger's attempt to arbitrate Shapiro's federal securities law claims. Jaslow filed a cross-motion against Newburger seeking an order staying any arbitration proceedings against Jaslow. In the reported opinion, Judge Mansfield granted that motion.

In so doing, he reasoned that he could not "separate out the common law from the federal law issues" asserted in the combined allegations of Jaslow asserted in single ¶11 of the Jaslow cross-complaint, and that if he could not do so, *a fortiorari*, an arbitrator could not. He ruled that consequently Newburger could not

defeat the judiciary's "exclusive jurisdiction over the Federal Securities Act claim by compelling arbitration of an ancillary pendent dispute" (320 F.Supp. 600, ¶2, 3).

Even if the District Court's holding in *Shapiro* had been binding on the United States Court of Appeals for the Fifth Circuit, the latter's opinion in our case poses no conflict with Judge Mansfield's decision. Tandy had conceded in the Trial Court that the federal securities fraud claims of Count VI were "similar" and so "should be tried together" (A. 80). The Fifth Circuit's opinion agreed with the trial judge below and with the rationale of *Shapiro* that when it is:

> "impractical if not impossible to separate out non-arbitrable federal securities law claims from arbitrable contract claims, a court should deny arbitration in order to preserve its exclusive jurisdiction over the federal securities act claims." (A. to Petition, p. 9).

But the Fifth Circuit ruled the contract claims asserted by Sibley's Counts I, II, III and V were not " 'intertwined' in the legal sense." In so doing, the Court applied the legal test of *Shapiro* but simply found the Sibley contractual claims fell outside the ambit of that test.

The Petition (p. 8) distorts what the Fifth Circuit's opinion said. It did not create a test that a dispute be deemed "wholly non-arbitrable if the arbitrable and non-arbitrable issues are 'intertwined in the legal sense' " but "partly arbitrable if *those issues* 'are [only] to some degree intertwined and overlapping' or 'dependent.' "

Instead, in distinguishing *Shapiro*, the Fifth Circuit's opinion[13] stated that, in the case at bar, Sibley's "claims were not 'intertwined' in the legal sense." At the same time the opinion correctly recognized that the 10b-5 claim was "dependent" upon the contract claims. This, as we have seen, *supra*, p. 1, fn. 1, was because Petitioner made it dependent in his pleading. Later in its opinion the Fifth Circuit supported "dependency" by pointing out that the fraud claims, sounding in tort, were predicated upon Parker's (i.e., Sibley's) contractual positions being resolved against Parker, even though recognizing that "the *facts* are to some degree intertwined and overlapping." This is not a statement that the *issues* were intertwined and overlapping, as Petitioner claims here.

Nor was this the first time that a federal court has ruled arbitration could be had of arbitrable claims while non-arbitrable claims be stayed even though arbitration would "greatly reduce the fact issues remaining in the anti-trust (i.e., the non-arbitrable) count. *Black v. Econo-Car International, Inc.*, 404 F.Supp. 600, (D.C. Mass. 1975), 602, ¶1.[14]

In *Macchiavelli v. Shearson, Hammill & Co., Inc.*, 384 F.Supp. 21 (E.D. Ca. 1974), the court discussed the power of a District Court to split federally cognizable issues from arbitrable issues. Even though stating the two sets of claims before it were related, it referred to arbitration contractual issues and retained

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[13]A. to Petition, p. 9.

[14]In *Black* the non-arbitrable claims grew out of allegations of Sherman and Clayton Act violations, but the Petition (p. 9, fn. 4) deems rulings in anti-trust suits analogous on the point.

jurisdiction over the 10b-5 issues, saying that such a severance:

> "would serve well the purposes of both the Securities and Exchange Act of 1934 . . . and the Federal Arbitration Act."

In so doing it noted that "Breaches of contract are the archetypal kinds of dispute referable to arbitration" (384 F.Supp. 30, ¶13-15).

Nor does *Stockwell v. Reynolds & Co.*, 252 F.Supp. 215 (S.D.N.Y. 1965), the other federal District Court case upon which Petitioner places primary reliance, offer him any better support. He cites (Petition, pp. 7-8) *Stockwell* as if holding that if any of the same facts affect both arbitrable and non-arbitrable "legal theories," the entire dispute must be judicially resolved and none of it can be arbitrated.

Stockwell held no such thing. It could not have so held because the opinion concludes by stating (252 F.Supp. 221, ¶12) that defendants' motion for an order directing arbitration as to Counts II and III was granted, although arbitration was to be stayed pending final determination by the court of non-arbitrable Counts I and IV (10b-5 counts) because judicial determination of Counts I and IV "would have a definite bearing on the outcome of the arbitration proceedings." (252 F.Supp. 220, top 2nd col.).

Stockwell deals with a number of motions filed in two separate action in each of which plaintiffs were citizens of the State of Washington and defendants were Reynolds & Co., a New York stock brokerage

partnership, and Ralph E. Carpenter, a New York citizen and partner in defendant Reynolds & Co. and at all relevant times a director of Alside, Inc., whose stock was listed on the NYSE. Each of the two complaints involved contained five counts — three against both defendants and two against defendant Carpenter alone:

> Count I — charged federal securities act violation;
>
> Count II — charged common law fraud;
>
> Count III — charged common law negligence;
>
> Count IV — repeated charge of securities act violation by defendant Carpenter alone;
>
> Count V — charged Carpenter with breach of fiduciary duty as a director of Alside.

Among the motions considered by the opinion were those seeking an order directing Counts II, III and V be submitted to arbitration pursuant to the arbitration clause in the Customer's Agreement entered into by defendant Reynolds & Co. with each plaintiff. Defendants did not seek arbitration of the federal securities fraud claims but only arbitration of common law claims, including common law fraud.

The opinion expressly stated that, while Counts II and III *were* subject to arbitration, since the relief sought in such two counts was based on the same transactions as were the subject of the federal securities act non-arbitrable Counts I and IV:

> "There would appear to be little purpose in having both the court proceeding and the arbitration going on at the same time"

and that since ultimate determination by the court of Counts I and IV would have a definite bearing on the outcome of the arbitration proceeding, the court was "not prepared to direct arbitration of Counts II and III at the present time" (252 F.Supp. 220, ¶¶4-7).

Galt v. Libbey Owens Ford Glass Co., 376 F.2d 711, 715 (7th Cir. 1967)[15] explains the holding in *Stockwell* as being that:

> "arbitration of Counts I and IV of the complaint was precluded by the doctrine of *Wilko v. Swan.* . . . nevertheless, the District Court granted the defendants' motion that the subject matter of Count II and III be submitted to arbitration. Arbitration of those counts was stayed temporarily because arbitration of Counts I and IV foreclosed by the *Wilko* case."

Stockwell thus ruled that the common law fraud claim was arbitrable even though based on the same transactions as the non-arbitrable federal securities fraud claim. It merely stayed arbitration pending judicial determination of the non-arbitrable claims.

In the case at bar, the reverse sequence was proper, as ruled by the Fifth Circuit, because Sibley's pleadings made it proper, conditioning his non-arbitrable fraud claims upon first resolution against him of his arbitrable contractual claims.

Illustrating the importance of the pleadings in determination of whether arbitration of arbitrable issue or trial of non-arbitrable issues should have prece-

[15]cited by Petitioner (Petition, p. 19-20).

dence is this Court's decision in *Moseley v. Electronic Facilities*, 374 US 167 (1963). There, disputes arose under subcontracts coming within the scope of the Miller Act, 40 USC §§270a-270d. Respondent filed a suit in a New York state court seeking an order directing arbitration in accordance with arbitration provisions of the subcontracts. Thereafter, Moseley filed the reported litigation in a U. S. District Court of Georgia seeking recovery of amounts allegedly due under the subcontracts, or recission of them on the grounds of fraud and recovery on a *quantum meruit* basis, and an injunction enjoining Electronic from proceeding with its arbitration efforts in the New York action. The U. S. District Court granted a restraining order directed at the New York arbitration proceeding. The Court of Appeals reversed, holding that Moseley must arbitrate in New York.

Moseley's pleading had attacked the arbitration clause as having been a means used to effect a fraudulent scheme. This Court there stated:

> "With the *pleadings in this posture*, we are obliged to pass upon the *priority* in determination of that issue (i.e., fraud in procuring insertion of the arbitration clause in the subcontracts) in the trial of the case." 374 US 171.

The opinion reasoned that the issue of fraud in the inducement of the arbitration provision must be determined first because if determined favorably to Moseley, "there can be no arbitration under the subcontracts." Priority was given to trial of that fraud

issue because "disposition of the fraud issue may dispose of the entire suit." *Ibid.*

Contrasted with the status of the pleadings there, in the case at bar prior disposition of Sibley's Count IV and VI fraud claims could not dispose of his contractual claims. The converse, as we have seen, was true, if arbitration disposed of them as Sibley claimed they should be resolved. Based on the status of Sibley's pleadings, the Fifth Circuit properly gave priority to the arbitrable issues and stayed trial of the non-arbitrable issues pending the outcome of that arbitration.

Sibley's Petition would deny a United States Court of Appeals the power to countermand any exercise of discretion by a trial court. While we question his contention that Tandy's motion merely called for an exercise of the trial court's discretion[16], determination of that legal question has no bearing upon the correctness of the Fifth Circuit's opinion. If it was a matter of discretion, the Court's ruling amounts to one that the trial court abused her discretion. If the trial court has any discretion in the matter, it could only be with respect to determination of arbitrability because the Federal Arbitration Act requires in mandatory language a stay of trial of arbitrable issues (9 USC §3). And as to arbitrability, this Court has ruled it:

> "is a matter to be determined by the Court on

[16]See *American Locomotive Co. v. Chemical Research Corp.*, 171 F. 2d 115 (6th Cir. 1948), stating at p. 122 that the matter of a stay for arbitration:

> "would seem to us to be one within the judgment of the trial judge rather than a matter of discretion, reversible only for abuse. . . ."

> the basis of the contract entered into by the parties.," *Atkinson v. Sinclair Ref. Co.*, 370 US 238, 241 (1962)."[17]

so there would seem to be little left to discretion.

In any event, whether such determination of arbitrability by a trial court be an exercise of discretion or of legal judgment, a United States Court of Appeals has the power to review any such determination and even to make one *"de novo"*[18] *Necchi v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693 (2nd. Cir. 1965). There, the District Court had referred the entire matter to arbitration without first passing upon which issues were arbitrable within the terms of the arbitration provision of the contract involved. After stating that an order compelling a party to arbitrate under such a contractual provision:

> "is simply an order granting specific performance of an arbitration provision. . . ." (348 F.2d 696, ¶¶3-7)[19]

the Second Circuit in its opinion proceeded to "rule on the arbitrability of each of the items" (348 F.2d 697, ¶8).

[17]While *Atkinson* was an action to compel arbitration under §301 of the Labor Management Relations Act, 29 US §185, the same principle is "equally applicable in proceedings to compel arbitration . . . under the federal arbitration act." *Necchi v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693, 696, bottom 2nd col. (2nd Cir. 1965).

[18]to use the expression of Petitioner (Petition, p. 8, 11).

[19]To the same effect is *Victory Transport, Inc. v. Comisari General*, 336 F.2d 354, 364, ¶14 (2nd Cir. 1964):

> "Implicit in the agreement to arbitrate is consent to enforcement of that agreement".

The Petition (p. 10) even quarrels with the rule — based on the ancient distinction between law and equity — governing appealability of an interlocutory order. Sibley would have this Court grant certiorari and expend its time considering a matter it has already ruled upon in *Baltimore Contractors, Inc. v. Bodinger*, 348 US 176 (1955) and a matter that has been dealt with at length by other decisions of this and lower courts. See: *Annotation*, "appealability of federal District Court order granting or denying stay of action pending arbitration" 99 L.Ed. 241. Under that historical distinction, an interlocutory order is not appealable within the statutory exception of 28 USC §1292(a)(1) if equitable relief is sought because "a stay of an equity type proceeding is to be considered akin to an order within the action itself." *Standard Chlorine of Delaware v. Leonard*, 384 F.2d 304, 307, ¶2 (2nd Cir. 1967). In so ruling, the Second Circuit expressly stated it was agreeing with the Fifth Circuit rule[20] *(Id.*, 384 F.2d 308, ¶2), as does the Third Circuit[21], and as does the Tenth Circuit."[22]

In *Standard Chlorine*, as in the case at bar, plaintiff had not only sought damages for fraud but had also sought reformation (and damages for breach of contract after the contract was reformed). Based on this Court's ruling in *Baltimore Contractors, Inc. v. Bodinger, supra*, the Second Circuit in *Standard* felt ob-

[20]Which rule it quotes from *Jackson Brewing Co. v. Clarke*, 303 F.2d 844, 845 (5th Cir. 1962). See also *Firestone Tire & Rubber Co. v. International Union, Etc.*, 476 F.2d 603, 604, ¶1 (5th Cir. 1973).

[21]*Formigli Corp. v. Alcar Builders, Inc.*, 329 F.2d 79, 80 (3rd Cir. 1964).

[22]*Hart v. Orion Ins. Co.*, 427 F.2d 528, 530, ¶1 (10th Cir. 1970).

liged to:

> "conclude that Standard's complaint was sufficiently equitable in nature so that Judge Ryan's order was *not* appealable." 384 F.2d 309.

Sibley, having sought equitable relief (specific performance in Counts I and II and reformation in Count III), the Trial Court's order overruling Tandy's Motion to Stay was unappealable in at least the Fifth Circuit, if not in all others. But even if Tandy could have perfected an appeal from the Trial Court's interlocutory order denying Tandy's Motion to Stay, a second answer to Sibley's procedural criticism of the action of the Fifth Circuit in even giving consideration to Tandy's challenge to the Trial Court's denial in Tandy's appeal from a final judgment of the Trial Court is that such an interlocutory appeal is but permissive — not mandatory:

> "An interlocutory appeal is permissive rather than mandatory, and an aggrieved party may, at his election, decline to appeal an interlocutory order but appeal from the final determination of the case and at that point raise all questions involved in the case."[23]

See also: Judge Sanborn's opinion in *A&R Realty Co. v. NW Mut. Life Ins. Co.*, 95 F.2d 703, 705 (8th Cir. 1938); *Victor Talking Mach. Co. v. George*, 105 F.2d 697, 699, ¶¶1-5 (3rd Cir. 1939); and *Western States Mach. Co. v. S.S. Hepworth Co.*, 152 F.2d 79, 80, ¶4 (2nd Cir. 1945).

[23]*Caradelis v. Refineria Panama, S.A.*, 384 F.2d 589, 491, fn. 1 (5th Cir. 1967), citing *Gloria S/S Co., Inc. v. Smith*, 376 F.2d 46 (5th Cir. 1967).

Running as an undercurrent throughout the Petition — because it ruled against him — is Sibley's lament that the Fifth Circuit should not have even considered Tandy's appeal and in fact lacked power to reverse the Trial Court's judgment because based on jury verdict. To sustain such a contention would render any trial court's error self-immunizing from review. To hold that Tandy's contractual and statutory entitlement to arbitration was forever lost, because the trial judge erroneously denied it and thereafter held a jury trial, not only would controvert the very purpose of appellate review but would preclude orderly development of appellate case law in any instance where a jury trial had been erroneously conducted.

If an appellate court lacks power to enforce the "unmistakably clear congressional purpose"[24] behind the United States Arbitration Act, how else can that congressional policy be served and protected when subverted by a trial court?

Sibley's precise argument has already been laid to rest by cases like *General Guaranty Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924, 929 (5th Cir. 1970) where, following another erroneous denial by a trial judge of a motion to stay to permit arbitration, the appellate court reversed and ordered arbitrable issues to be arbitrated even though already

[24]". . . that the arbitration procedure, when selected by the parties under a contract be speedy and not subject to delays and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin*, 388 US 395, 404 (1967).

"The United States Arbitration Act, now 9 USC §§1, et seq . . . was designed to allow parties to avoid 'the costliness and delays of litigation'. . . HR Rep No 96, 68th Cong, 1st Sess, 1, 2 (1924) . . . ." *Scherk v. Alberto-Culver Co.*, 417 US 506, 510-11 (1974).

once judicially litigated, holding:

> "[T]he factors of delay and possible double expense, arising from the court's determination of the initial issue, is not a basis for denying the arbitration otherwise available by reason of that determination."

Finally Sibley argues (Petition, p. 19, et seq) that to stay trial of non-arbitrable issues pending arbitration of arbitrable ones "improperly reconciles the federal policy favoring arbitration" with the doctrine of *Wilko* precluding waiver in advance of the right to litigate claims of federal securities act fraud. In order to make this argument Sibley must resort to the insupportable claim that the Fifth Circuit opinion has in fact denied him the right to ever litigate such non-arbitrable issues. He pretends (Petition, p. 21) that, if the Trial Court had initially granted Stay of the fraud issues, he would have forever been denied his right to judicial discovery. He misrepresents (p. 21) three of his exhibits: Nos. 29, 32 and 41.

The first, Pl. Ex. 29, has already been shown to have been but a PW draft of the 1971 audit report, so expressly qualified as to indicate nothing (see *supra*, p. 9).

The second, Pl. Ex. 32 (admitted A. 629), was a memorandum of Tandy's Vice President and Treasurer Tindall (A. 602), who testified it "had nothing to do with the inventories purchased in Hickok" (A. 631). Nor did any *witness* claim it did, although at trial and on appeal Sibley's counsel has sinisterly referred to this memo as the "game plan." The Tindall memo, prepared during the negotiation stages, dealt

entirely with two alternate accounting methods by which to account for the Parker-Hickok acquisition on *Tandy's books* if the negotiations resulted in consummation.

Mr. Tindall was considering the pros and cons of whether, if made, the acquisition should be treated on Tandy's books as a "purchase" or instead as a "pooling of interests," the two generally accepted accounting methods of treating an acquisition on the books of the acquiring corporation. His memo pointed out that if the acquisition were treated as a "purchase" that "an allocation of purchase price"[25] could be made so that the expense of relocating the Hickok operation in Texas would not affect Tandy's earnings accounting-wise (such a treatment would have no effect income-taxwise). Clearly, the memo considered the accounting treatment to be reflected on *Tandy's* books, *not Parker's* books, because no such allocation could be reflected on the books of the company being acquired. This was the *sole* subject of Mr. Tindall's memo as he positively testified (A. 628-33). Irrespective of which alternative accounting method was chosen, there would be no effect on the purchase price to be paid by Tandy to the Parker shareholders.

The third, Pl. Ex. 41, was not a "false" certificate

[25]Similiar allocation was made on Parker's books when it acquired Hickok as a "purchase" in early 1970. Hickok had a deficit net worth and the acquisition cost exceeded that capital deficiency by some $2.6 million. Hence an allocation was required on the books of Parker as the acquiring corporation (Note B to Leidesdorf 12/31/70 audit report, Pl. Ex. 5, A. 1747, admitted A. 256). Such allocation did *not* affect the *Hickok* books, which continued to show a deficit net worth at 12/31/70 (Pl. Ex. 7, A. 1754, admitted A. 256).

and it is absurd to suggest (Petition, p. 16) that a reputable public accounting firm, before certifying a $5,800,000 inventory, did nothing but glance at this two-paragraph letter. Chait, PW's Manager of the 1971 audit did *not* testify, as claimed by the Petition (p. 16), that "without such a document PW would never have issued its audit. . . ." To the contrary, Chait testified that he had already obtained the same information "which was verbally expressed to us during the course of our examination" (A. 1400).

In answer to a *hypothetical* question of Sibley's counsel, Chait did indicate that if the information contained in the document had been false, he would not have signed the audit (A. 1400-1401). But this would have meant the verbal information obtained during the PW field audit was false. There was no proof the information was in fact false. The document was not "proven at trial to have been completely phony" as contended by the Petition (p. 16). Neither the Appendix references given by the Petition (p. 16), which we invite the Court to examine, nor any of the other evidence supports such a scandalous charge.

But all this "jury argument"[26] of Petitioner has no proper place in a Petition for Writ of Certiorari. The Petition (p. 2) invokes jurisdiction under 28 USC §1254(1), Therefore, under this Court's Rule 19(1)(b), the question the Petition presents for determination is simply whether the Court of Appeals —

[26]The Petition (p. 17) even deems pertinent a so-called "offer" of P. J. Parker to purchase all the marked down inventory. Such argument has no place in the Petition, especially in view of the fact that the Trial Court sustained Tandy's objection to the evidence and thereby eliminated it from the case (A. 1412).

either in controvention of an opinion of this Court, in conflict with an opinion of another Court of Appeals on the same matter, or in considering an important question of federal law which has not been but should be settled by this Court — has committed such action by ordering arbitration of arbitrable contractual issues prior to judicial resolution of non-arbitrable issues, if not mooted, as to properly call for an exercise of this Court's power of supervision.

No such need is shown by the Petition. This Court will not grant certiorari to afford further audience to private litigants disputing "corporate valuations centered around complex issues of accounting and valuation."[27] Such a dispute presents no matter of public import. Under the ruling of the Fifth Circuit, Respondents are to be afforded their contractual and statutory right to arbitration of the arbitrable issues drawn by the pleadings of the parties, and Sibley thereafter is to be accorded his right to judicial litigation of the non-arbitrable issues if they have not been mooted by that arbitration. The concluding paragraph of the Fifth Circuit's opinion on rehearing makes this clear:

> "The suggestion is made that our opinion cuts off Parker from asserting after arbitration any securities law claims it might have. We have not intended to suggest that. We did, and do, suggest that in a practical sense arbitration first in time might have disposed of this suit and, if not, might have limited its scope and clarified it. And it still might."

[27] Fifth Circuit Opinion below (A. to Petition, p. 10).

CONCLUSION

Petitioner has failed to demonstrate that there are any grounds for the exercise of this Court's discretionary certiorari jurisdiction. The holding in the Fifth Circuit conflicts with no decision of another Court of Appeals nor of this Court. The Court of Appeals has not erroneously decided an important question of federal law nor is any important question of federal law presented by the Petition.

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Cecil E. Munn
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Tandy Corporation

Of Counsel:
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June 18, 1977.

CERTIFICATE OF SERVICE

I, Cecil E. Munn, counsel for Tandy Corporation, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of June 1977 service of this BRIEF IN OPPOSITION to the PETITION FOR WRIT OF CERTIORARI has been made upon Petitioner Harper Sibley, Jr. by mailing three copies thereof by United States mail postage prepaid to Marvin S. Sloman at his office at 3000 One Main Place, Dallas, Texas 75250, counsel of record for Petitioner.

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